

Procurement: new statutory guidance

Introduction

The Scottish Government has issued new [statutory guidance](#) under the [Procurement Reform \(Scotland\) Act 2014](#). This covers: procurement strategies and annual procurement reports; sustainable procurement duty; community benefit requirements in procurement; selection of tenderers and award of contracts; and procurement for health or social care services. It follows earlier statutory guidance on [addressing fair work practices](#), including the Living Wage, in procurement. This 'suite' of statutory guidance also includes best practice guidance on the procurement of [care and support services](#). *(The Scottish Government also published guidance in February on the application of social issues in projects with a [significant steel](#) composition.)*

The statutory guidance advises public bodies on how to comply with the Act, and with the new [Procurement \(Scotland\) Regulations 2016](#), (made under the Act), and the [Public Contracts \(Scotland\) Regulations 2015](#) (which transpose the European public procurement Directive 2014/24/EU*). Public bodies must have regard to the statutory guidance, reading it together with the relevant sections of the Act and the Regulations, and should take account of the best-practice guidance in relation to procurement of care and support services. Contracting authorities should also take into account any other relevant guidance or good practice where appropriate.

*(*The two other 2014 European Directives in relation to procurement have also been transposed. Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, is transposed by [The Utilities Contracts \(Scotland\) Regulations 2016](#), and Directive 2014/23/EU is transposed by [The Concessions Contracts \(Scotland\) Regulations 2016](#).)*

Procurement Reform - disappointments, but some progress

The public sector in Scotland spends around £11 billion annually on goods and services – spending which we believe should be consistent with social, economic and environmental policy aims. Disappointingly, the Procurement Reform (Scotland) Act 2014 was largely about making processes more 'business friendly' rather than the original hoped for focus on sustainability. The Scottish Government has been supportive of the Living Wage and extending coverage. However, it could and should have made the Living Wage mandatory for all public sector contracts *(The real LW, not Chancellor George Osborne's newly introduced so-called National Living Wage.)* The Act is also far weaker than it should be on tax dodging and blacklisting. We had argued that companies involved in these should be banned from eligibility for public contracts. On tax dodging, much more could be done on addressing aggressive tax avoidance. And although blacklisting companies must be excluded, this

KEY POINTS:

- The Scottish Government has published a 'suite' of statutory guidance on public procurement under the Procurement Reform (Scotland) Act 2014.
- There are new procurement Regulations under the Act and transposing EU Directives into Scottish law.
- Procurement can and should be used to extend the Living Wage, address fair work practices, help public bodies contribute to Scotland's climate targets and promote ethical & fair trade and positive social outcomes.
- The changes don't go far enough overall, particularly on tackling tax dodging and blacklisting.



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can only be for three years from the breach, which could let some companies off the hook, and only convictions can be used, when unions argue revelations (and in some cases confessions) at the Scottish Affairs Select Committee inquiry should count. But there are limited provisions that branches should familiarise themselves with to ensure employers include action on these and other employment areas such as zero hours contracts, and on key ethical/sustainable priorities in their procurement strategies and practices.

Procurement Strategies

Contracting authorities expecting to have 'significant procurement expenditure' in the next financial year (a total value above £5 million excl VAT on regulated contracts – procurements for goods and services with estimated value equal to or greater than £50,000 and for works with estimated value equal to or greater than £2 million all contribute to the total) need to produce and publish a procurement strategy, with the first due by 31 December 2016. Contracting authorities must consult and engage with stakeholders and those affected by their procurements. They must review the strategy annually and publish annual reports and Scottish Ministers must publish an annual report of procurement activity in Scotland. There is guidance on each of the areas that the Act stipulates should be in the strategy, including: compliance with the sustainable procurement duty; use of community benefits (e.g. requirements on training/recruitment/subcontracting opportunities or other requirements to improve the area's economic, social or environmental wellbeing) in contracts worth £4 million or more; policy on consulting and engaging with those affected, including e.g. in health and social care procurements, consideration of the interests of users of the service, their families and carers; statement on the authority's general policy on payment of the Living Wage; on promoting compliance with health and safety legislation; on the procurement of fairly and ethically traded goods and services; on regulated procurements involving the provision of food to improve the health, wellbeing and education of communities in the area and promoting the highest standards of animal welfare.

Cost, quality, sustainability – & Most Economically Advantageous Tender

The 'Scottish Model of Procurement' defines value for money as the best balance of cost, quality and sustainability. Regulation 67 of The Public Contracts (Scotland) Regulations 2016 requires EU regulated contracts (thresholds info via link opposite) to be awarded to the 'most economically advantageous tender', known as MEAT. The guidance states that MEAT criteria must be made up of price or cost, and other criteria such as quality, organisational factors, which can include the qualifications and experience of staff, and issues associated with after sales service, technical assistance and delivery matters. EU regulated contracts may not be awarded on the basis of lowest price or lowest cost only. The guidance states that, for EU regulated procurements, where a contracting authority is determining the value of a contract on the basis of cost, the cost element can be calculated on the basis of the whole life cycle of the goods, works or services, as opposed to only the purchase price. The legislative provisions on life cycle costs don't extend to regulated procurements below the EU threshold values, but the guidance states that "the use of a life cycle approach will support a contracting authority's responsibility to consider how to support its sustainable procurement duty." Life cycle costs can represent costs such as research and development, site preparation, transfer of assets or redeployment costs, consumption of energy and other resources, end-of-life disposal costs such as decontamination, disposal or landfill tax. They can also take into account environmental factors such as pollution caused by extraction of raw materials, greenhouse gas emissions costs and other climate change mitigation costs. Explanations must be sought about tenders which could be regarded as abnormally low (best practice rather than obligatory for

Key documents

Statutory Guidance

www.gov.scot/Resource/0049/00496919.pdf

Best practice stat guid on care/support services

www.gov.scot/Resource/0049/00498297.pdf

Statutory Guidance on Fair Work/Living Wage

www.gov.scot/Resource/0048/00486741.pdf

UNISON Briefing 69 on Fair Work/LW guidance

www.unison-scotland.org.uk/briefings/b069_BargainingBrief_LivingWage+Procurement_No_v2015.pdf

Procurement Reform (Scotland) Act 2014

www.legislation.gov.uk/asp/2014/12/contents

Scots Proc Policy Notes

www.gov.scot/Topics/Government/Procurement/policy/SPPNSSPANS/policy-notes

UNISON Briefing on Ethical Care Charter

www.unison-scotland.org.uk/briefings/b070_BargainingBrief_EthicalCareCharter.pdf

Scottish Model of Procurement

www.gov.scot/Topics/Government/Procurement/about/spd-aims

Thresholds for EU regulated procurements

www.gov.scot/Topics/Government/Procurement/policy/10613

MSP Briefing on failure to tackle tax dodging

www.unison-scotland.org.uk/briefings/MSPe-briefing_ProcurementTaxDodgingBlacklisting_Jan2016.pdf

procurements below EU thresholds) and any such bid must be rejected where it is established it is due to not complying with environmental, social or labour law.

Extending the Living Wage, particularly in social care

Our November 2015 Briefing 69 on the addressing fair work practices guidance shows how public bodies can legally ensure that the Living Wage and other employment matters such as trade union recognition and representation and no “inappropriate” use of zero hours contracts, are included. Section 52 guidance and the PPP Protocol apply. The Scottish Government in its 2016/17 Budget has announced an extra £250 million per year through health and social care partnerships to support the delivery of improved outcomes in social care, including a requirement that all social care workers, including in the independent and third sectors, should be paid at least the Scottish Living Wage of £8.25 an hour. Exact costings are unclear, as is what proportion the Scottish Government envisages being covered by local authorities and by providers, and any provision for uprating in November 2016. Some are saying it will be unaffordable. UNISON has raised these concerns with Ministers and called for a tripartite process to ensure the objective is implemented. There are fears that employers might bear down on other terms and conditions or training budgets to meet the priority of the Living Wage requirements. This makes it essential that these broader workforce elements are included in tender evaluations. The statutory guidance on Fair Work practices shows how this can be done.

Sustainable Procurement Duty

Contracting authorities will have to take account of the sustainable procurement duty and community benefit requirements for procurements from 1 June 2016. The duty includes that before a contracting authority buys anything it must think about how it can improve the social, environmental and economic wellbeing of the area, with a particular focus on reducing inequality. The guidance says compliance may aid compliance also with other legislation that places specific procurement requirements on a contracting authority, including the Equality Act 2010 and Climate Change (Scotland) Act 2009. Public bodies’ climate duties require them to act in the way best calculated to contribute to meeting climate targets and to help deliver any statutory climate adaptation programme, and in a way they consider most sustainable. Whole life cycle costing will help here.

Procurement of Health and Social care services

The guidance has a chapter on the new ‘light touch’ procurement regime for certain services including health and social care. It should be read alongside the best practice guidance on the procurement of care and support services. The main EU rules (in The Public Contract (Scotland) Regulations 2015) apply only to health and social care contracts worth at least £589,148 (link to EU thresholds table above). Contracts below that, but worth at least £50,000 are regulated by the Act. There is some flexibility on a case by case basis about issues such as whether these (below EU threshold) require advertising and competition. Public bodies should ensure a focus on personal outcomes, strategic planning, involvement of people who might use the services and their carers and should take a human rights based approach.

Action for branches

Branches should seek strong commitments to key policy asks in procurement strategies. Extending the Living Wage in social care is a priority. Suggest use of the Ethical Care Charter and the Fair Tax Mark, and perhaps Oxfam’s Humankind Index in evaluation criteria. Other policy areas to consider, including e.g. recruitment of apprentices and person-centred procurement, featured in the updated [Ten Asks](#) for ethical public procurement and the Scottish Food Coalition’s recent report [Plenty](#), which called for a socially and environmentally just food system. Although the Scottish Government rejected including many of the asks, it is worth pursuing some at local level as well as pushing nationally for stronger action on tax dodging etc. Send the B&C Team examples of good strategies for adding to a future update of this briefing.

More info

Scottish Government
press release re excluding
blacklisting firms
<http://news.scotland.gov.uk/News/Tackling-blacklisting-20a2.aspx>

How procurement should be used to tackle tax dodgers
<http://publicworksscotland.blogspot.co.uk/2016/02/using-procurement-to-tackle-tax-dodgers.html>

Action on Procurement letter critical re weak on tax dodging/blacklisting
www.commonspace.scot/articles/3307/action-on-procurement-open-letter-to-minister

Public bodies climate change duties guidance
www.gov.scot/resource/0oc/340746/0113071.pdf

Guidance on social issues in procurements with major steel component
www.gov.scot/Resource/0049/00494775.pdf

Fair Tax Mark
www.fairtaxmark.net/

Tax Research UK
<http://www.taxresearch.org.uk/Blog/>



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